

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Mailed:
December 11, 2003
Paper No. 12
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jaguar DrinkWare

Serial No. 78010982

Mark J. Murphy of Cook Alex McFarron Manzo Cummings &
Mehler, Ltd. for Jaguar DrinkWare.

Caroline Fong Weimer, Trademark Examining Attorney, Law
Office 115 (Tomas Vlcek, Managing Attorney).

Before Simms, Hohein and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Jaguar DrinkWare seeks registration on the Principal Register for the mark JAGUAR DRINKWARE for goods identified as "mugs, drinking steins, and drinking cups in the nature of tumblers for coffee, fountain drinks and other drinkable liquids, all being made of a variety of materials except for precious metals, namely, porcelain, stainless steel, plastic, acrylic and aluminum," in International Class 21.¹

¹ Application serial number 78010982 was filed on June 2, 2000 based upon applicant's allegations of a *bona fide* intention to use the mark in commerce. At the request of the Trademark Examining Attorney, applicant agreed to disclaim the generic term "Drinkware" apart from the mark as shown.

This case is now before the Board on appeal from the final refusal to register based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles three marks owned by Jaguar Cars Limited, as follows:



registered for "coasters not of paper and not being table linen, mugs and automobile cleaning cloths," in International Class 21²



registered for "drinking steins; beverage glassware; thermal insulated containers for beverages; water bottles, sold empty; portable coolers and tankards not of precious metal," in International Class 21³

JAGUAR RACING

registered for "drinking steins; beverage glassware; drinking mugs; thermal insulated containers for beverages; water bottles, sold empty; portable coolers and tankards not of precious metal," in International Class 21⁴

² Reg. No. 1645289 issued on May 21, 1991; Section 8 affidavit accepted and Section 15 affidavit acknowledged; renewed.

³ Reg. No. 2175107 issued on July 21, 1998.

⁴ Reg. No. 2508053 issued on November 13, 2001.

as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal but applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant argues that the marks are quite different when compared in their entireties; that the United States Patent and Trademark Office has registered numerous marks having the word "jaguar" in the marks; that whatever fame may attach to registrant's mark for automobiles does not carry over to these goods; and that despite contemporaneous usage for years, applicant knows of no instances of actual confusion.

In turn, the Trademark Examining Attorney contends that the marks are confusingly similar because the word "Jaguar" is dominant in all of the marks; that the goods are identical in part and otherwise closely related; that the third party registrations listed by applicant are of minimal probative value; and that the legal test is likelihood of confusion, not actual confusion.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of

confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

When considering the relatedness of the respective goods, we look first to registrant's goods as listed in the identifications of goods in the cited registrations. These include mugs, steins and beverage glasses in International Class 21. These goods would appear to be identical to applicant's own mugs, drinking steins, and drinking cups. Registrant's other beverage containers are closely related to applicant's goods.

Moreover, turning to the du Pont factor dealing with the similarity or dissimilarity of established, likely-to-continue trade channels, given that neither registrant nor applicant has placed any restrictions on their respective channels of trade, we must presume that applicant's goods and registrant's goods will move through all of the normal channels of trade to all of the usual consumers of goods of the type identified. See Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Similarly, we should also note that as to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, these goods are relatively inexpensive products and would not be subjected to the careful scrutiny that would accompany more expensive items.

We turn next to the du Pont factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound and connotation. As our principal reviewing court, the Court of Appeals for the Federal Circuit, has pointed out, "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In summarizing her comparison of the involved marks, the Trademark Examining Attorney argues that these marks "all create the same commercial impression." (Trademark Examining Attorney's appeal brief, unnumbered page 4)

While we compare the marks in their entireties, the Court of Appeals for the Federal Circuit has also held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or

less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987), and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In this vein, the Trademark Examining Attorney argues that inasmuch as the word "Drinkware" in applicant's mark is generic and hence disclaimed, one should accord little weight to this term as distinguishing applicant's mark from the cited marks. Moreover, the image of the leaping jaguar above the word "Jaguar" in two of the cited marks reinforces the word portion of the marks rather than being a separable, easily-verbalized part of these marks. Hence, the identical word "Jaguar" is the same literal element that would be used to call for all of these goods. Finally, in the newest of the cited registrations, the word "Racing" (like the leaping jaguar image) reinforces the fact that registrant's beverage containers are collateral items for the well-known auto manufacturer of Jaguar automobiles.⁵ This additional term, then, in no way

⁵ In its brief (p. 6), applicant concedes that the word JAGUAR and the leaping jaguar image may be famous when associated with automobiles.

detracts from the overall commercial impression surrounding the Jaguar brand.

As to the alleged weakness of the cited marks, applicant argues that:

... the Trademark Office has already registered trademarks for many other "jaguar" type marks to others than Jaguar Cars Limited Corporation United Kingdom, such as for example, "JAGUAR" (many), "JAGUAR C 2000," "JAGUAR CTS," "VERTEL JAGUAR," "Jaguar" with different cat designs (even design ones with a leaping Jaguar), and many others ..., and found no likelihood of confusion between these marks and the cited marks. (footnote omitted) Clearly, the cited marks are not strong marks.

(applicant's appeal brief, p. 7) In support of its position that there are "many other 'jaguar' type marks" on the federal trademark register, applicant had attached to its earlier response to an Office action copies of printouts of these third-party registrations taken from the United States Patent and Trademark Office's computerized database.

As was correctly noted by the Trademark Examining Attorney, these registrations do not indicate actual use of the marks in the marketplace by the respective registrants. Nonetheless, when according these third-party registrations the limited probative value to which they are entitled, we cannot conclude that the cited marks are weak for these mugs, steins, drinking glasses and other beverage

containers. As noted by the Trademark Examining Attorney, applicant's argument about the alleged weakness of the cited marks is not particularly persuasive "when other cited marks are for goods or services with no commercial relationship to Registrant's goods." (Trademark Examining Attorney's appeal brief, unnumbered page 6). Indeed, applicant has pointed to registrations of a variety of composite marks containing the word "Jaguar" (some of which also include other prominent, arbitrary matter) that are registered for goods quite different from registrant's goods, e.g., machine tools, industrial chemicals, rodenticides, bailer twine, software for project management, communications management and applications management, medicated preparations, premium paper, cutlery, hair brushes and combs.

As to the du Pont factor focusing on fame, other than applicant's limited concession that the word JAGUAR and the leaping jaguar image may well be famous when associated with automobiles, there is no evidence in this *ex parte* record relating to the fame of the cited mark. Accordingly, this factor favors neither the position taken by the Trademark Examining Attorney nor that of applicant.

Finally, we turn to the length of time during and conditions under which there has been contemporaneous use

without evidence of actual confusion. Applicant argues that in considering the du Pont factors in this case, we should consider that registrant's and applicant's respective goods have coexisted for two years (at the time of applicant's appeal brief) without any confusion.

However, there was only a single year of coexistence of the marks at the time of the declaration signed by applicant's president. One year of use without any actual confusion is an extremely short period of time on which to base an argument that there is not a likelihood of confusion, particularly when the record contains no evidence that these respective marks have been used contemporaneously on these respective beverage containers in the same geographical area. It is therefore not at all surprising that no instances of actual confusion have been reported to applicant since 2001. The absence of any instances of actual confusion can be a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or both of these trademark owners. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d

1768, 1774 (TTAB 1992). Such evidence is not a part of this record. Furthermore, we have not had opportunity to hear from the registrant on this point. Moreover, as noted by our principal reviewing court, the Court of Appeals for the Federal Circuit:

With regard to the seventh du Pont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, J.C. Hall Co. v. Hallmark Cards, Inc., 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context.

In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). Therefore, applicant's claim that no instances of actual confusion have been brought to its attention is not indicative of an absence of a likelihood of confusion, and we find that this factor favors neither the position taken by applicant nor that of the Trademark Examining Attorney.

In conclusion, given that the goods herein are identical in part and otherwise closely related, that they

are inexpensive items that will presumably move through the same channels of trade to the same classes of consumers, that applicant's mark creates the same overall commercial impression as do the cited marks, and that this record does not support the conclusion that the cited marks are weak as applied to registrant's listed goods, we conclude that applicant's mark, when used in connection with its identified goods, so resembles the three registered marks owned by Jaguar Cars Limited as to be likely to cause confusion, to cause mistake or to deceive.

Decision: The refusal to register under Section 2(d) of the Trademark Act is hereby affirmed.